IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: CA&R 37/2021

In the matter between:

PULE JAMES BORAKI **APPELLANT**

And

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Boraki v Minister of Police* (Case no. CA & R 37/21) (02 June 2023)

Coram: Phatshoane DJP and Lever J

Heard: 20 February 2023

Delivered: 02 June 2023

Judgment

Phatshoane DJP

[1] Essentially, this appeal turns on a question whether the writ of execution issued by Magistrates' Court for the District of Kuruman (the Magistrates' court) ought to be stayed pending an appeal before this Court which has lapsed. The appellant, Mr Pule James Boraki, instituted action in the district court of

Kuruman, against the respondent, the Minister of Police, for damages arising out of his unlawful arrest, detention and assault which allegedly took place on 14 October 2013. The merits were disposed of first while the question of *quantum* stood over for later determination. On 17 November 2016 Magistrate PK Magidela entered judgment in favour of the appellant on the merits with costs. A year and five months later, pursuant to argument on the quantum, the magistrate ordered, on 4 May 2018, that the appellant be paid damages in the amount of R100 000.

[2] On 28 May 2018 the respondent filed a Notice of appeal against the whole of the judgment and order of the magistrate (primary judgment) on both the merits and quantum. He did not prosecute the appeal. On 29 January 2019 the appellant's attorneys directed a letter to the respondent's attorneys in which they enquired on the proposed date for the hearing of the appeal. Some seven months later, on 21 August 2019, the appellant reminded the respondent that in terms of rule 50(1), the respondent was supposed to prosecute the appeal within 60 days and that failure to do so meant that the appeal was deemed to have lapsed.

[3] As a consequence of this, and two years later following the filing of the Notice of appeal, the appellant issued a writ of execution in the Magistrates' court to satisfy the judgment debt on 8 October 2020. On 04 November 2020 the respondent was once more reminded:

> 'In die verband is ons van mening dat u kliënt se appél reeds gedurende 2018 verval het en kan kliënt derhalwe nie voortgaan met die appél sonder die bring van 'n aansoek om die appél te laat herinstel nie.
>
> Indien u kliënt nie voortgaan met die voorsetting van die appél en bring van die nodige aansoek voor of op 1 Desember 2020 nie, sal ons die Balju opdrag gee om voort te gaan met die uitvoering van die lasbrief vir eksekusie.'

[4] The writ of execution was reissued on 03 February 2021. This precipitated the launching of an urgent application on 6 April 2021 in the Magistrates' court by

the respondent to stay the execution of the writ pending the final determination of the appeal. The respondent further sought an order that the appellant and the Sheriff of Kimberley be interdicted from taking any further execution steps pending the outcome of the appeal.

[5] Two months later, on 10 June 2021, when the appeal had already lapsed sometime in 2018, the magistrate gave an *ex tempore* judgment, I assume under s 62 read with s 78 of the Magistrates' Courts Act 32 of 1944 (the Act), in which she held that there was an appeal pending before the High Court and that the record of the proceedings had been requested from the clerk of the civil court, Kuruman, through e-mails that dates as far back as 2018 to no avail. The clerk had failed to provide reasons to the respondent why the records could not be furnished. She held that the respondent could not be blamed for failure to prosecute the appeal within the prescribed timeframes and that the clerk of the court was solely to blame for the delay. Without having satisfied herself that good cause existed for the stay of the writ she reasoned that should the warrant not be stayed, "then there is a possibility that [an] injustice may result". Her order, which is incoherent, is as follows:

> "The opposition of the interdict is not successful, thus the interdict stays and the application is thus successful."

[6] It is that decision which is the subject of this appeal. Section 83 of the Act provides, in part, that a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the High Court having jurisdiction to hear the appeal against any judgment of the nature described in section 48; or any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs. The appealability of the orders under s 78 of the Act was settled by the Constitutional Court in *Mathale v Linda and Another*[1] which unanimously found that, on a proper interpretation of s 83*(b)* of the Act, such orders are appealable.

---

[1] 2016 (2) SA 461 (CC) paras 30-32.

[7] The appellant raised various grounds of appeal against the decision of the magistrate. However, the thrust of his argument both in the court a quo and in this court is that the respondent never prosecuted his appeal against the primary judgment of the magistrate. Therefore, the underlying causa, upon which the execution of the judgment debt ought to have been stayed, was absent. To the extent that the magistrate granted the stay of execution, when there had been no appeal pending, it was argued, she erred. The respondent countered that there had been no basis for it to prosecute the appeal without the transcribed record of the trial proceedings. He further sought to argue that the record of the present proceedings was incomplete because it is uncertain to him that the interdict that was issued by the magistrate was interim or final. He argued that insofar as the interdict may have been interim, it is not appealable. The records in respect of the orders issued by the magistrate were not provided. Consequently, so he argued, this Court would not be in a position to adjudicate the appeal. To that extent, he urged that the present appeal be postponed for the complete record to be placed before the court in terms of s 87 of the Act.

[8] Section 87*(b)* of the Act provides that if the record does not furnish sufficient evidence or information for the determination of the appeal, the Court on appeal may remit the matter to the court a quo with instructions on the taking of further evidence or the setting out of further information. We remain unpersuaded that the record before us is insufficient for purposes of deciding this appeal. It goes without saying that the magistrate granted an interdict restraining any execution to be taken against the respondent. What further orders could there have been.

[9] Execution is subject to the supervision of the court which has inherent jurisdiction to stay its operation if the interests of justice so require.[2] I venture to say that the suspension of a writ presupposes the existence of a

---

[2] *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) para 13.

valid application for leave to appeal not one that has lapsed. In its remarks on the now repealed Rule 49(11) of the uniform rules of this Court in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*[3] the Supreme Court of Appeal said:

'The [argument] was based on Uniform Rule 49(11), which provides that, where an appeal has been noted or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the Modder East Squatters lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal, by then, had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order. In this case, there was none.'

Sutherland J buttresses the inherent logic of the above position as unassailable in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*[4] as follows:

'It can be tested by asking what would happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment would then be suspended...'

[10] Section 78 of the Act provides that:

"Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application."

---

[3] 2004 (6) SA 40 (SCA) (2004 (8) BCLR 821; [2004] 3 All SA 169) para 46.

[4] 2016 (3) SA 110 (GJ) para 15.

[11] Section 62(3) of the Act provides that: ‘Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under s 72. The phrase 'on good cause shown' has been defined as any fact or circumstance that would make it just or equitable as between the parties that execution should be stayed.[5] The accepted common law rule of practice is that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. The purpose of this rule is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from. [6]

[12] What should be considered is whether in the present case, facts or circumstances existed that would have made it just or equitable as between the parties that execution be stayed. In terms of Rule 51(9) of the Rules Regulating the Conduct of the Proceedings of The Magistrates' Courts of South Africa[7] a party noting an appeal or a cross-appeal shall prosecute that within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary. By prosecution of an appeal is meant applying in writing to the registrar, on notice to all other parties, for a date of hearing.[8] Rule 50 (4) provides that the hearing of an appeal shall be subject to the delivery by the appellant of the notice of set down for a day approved by the registrar or clerk of the court.

---

[5]*Dumah v Klerksdorp Town Council* [1951] 4 All SA 365 (T) at 368; 1951 (4) SA 519 (T) at 522; *Marendaz v Marendaz* [1953] 4 All SA 85 (C) at 94; 1953 (4) SA 218 (C) at 228.

[6]*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A-F.

[7]Published under GN R740 in *GG* 33487 of 23 August 2010 [with effect from 15 October 2010].

[8]See Jones and Buckle, Civil Practice of the Magistrates’ Courts in South Africa, Jutastat e-publications- RS 28, 2021 Rule-p51-15.

[13] Insofar as the appeal was purportedly pending in this Court, Rule 49(6) of the Uniform Rules of this Court provides:

'*(a)* Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party, the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.'

[14] Rule 49(7) of the Uniform Rules of this Court provides:

'*(a)* At the same time as the application for a date for the hearing of an appeal in terms of sub-rule (6)*(a)* of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned.

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of sub-rule (7)*(a),* the other party may approach the court for an order that the application has lapsed.'

[15] Several correspondence, between what appears to be the respondent's attorneys and the clerk of the court, requesting that the record be provided, is attached to the founding affidavit in respect of the application to stay the writ that served before the magistrate. Save to attach these, no explanation is furnished with regard to the respondent's failure to prosecute the appeal. Rule 49(6)*(a)* serves a very useful purpose of securing efficient and expeditious disposal of appeal processes. It is trite that the obligation to prepare and file the complete record of appeal falls squarely on the appellant's attorneys. In respect of the appeal against the primary judgment that duty rested on the respondent's attorneys (who represented the appellant in that case). The magistrate was incorrect in her conclusion that the clerk was solely to blame for the record.

[16] The respondent did not apply to the registrar of this Court for a date of hearing of the appeal; he did not request the set down of the appeal after the expiry of the 60 days as set out in rule 49(6); he did not apply for any extension of time to file the record; or bring an application to compel the clerk of the court to produce the record of the proceedings, or approach the court for directives on the reconstruction of the record in the event it could not be located. As a consequence of the inaction, the appeal lapsed. The net effect of all the above is that the circumstances that would have made it just or equitable as between the parties, that execution be stayed, were absent. It is disconcerting that no submissions were made to us that the respondent had filed an application for

condonation and the reinstatement of the appeal against the primary judgment nor was there any indication made to us that he intended doing so.

[17] Where execution has been stayed upon conditions and the conditions are not fulfilled, the execution may proceed without any further order of court.[9] However, where, as here, execution has been stayed unconditionally, and the creditor wishes to obtain a writ, his remedy is to apply to the court, on notice to the judgment debtor, for leave to take out the warrant.[10] The following remarks by Vermooten J in *Sabena Belgian World Airlines v Ver Elst and Another*[11] resonates with the present setting:

> **'**The right which Sabena seeks to protect is to stay the writ and suspend execution of the judgment. It is true that, at common law, noting appeal suspends execution automatically (*De Lange v Bonini* 1906 TH 25; *Reid v Godart* 1938 AD 511 at 513). But here the appeal has lapsed. In such event execution is no longer suspended, but the judgment can be carried into execution. It is for that reason that the clerk of the court issued the warrant of execution on 12 June 1979. See *Herf v Germani* 1978 (1) SA 440 (T) at 449G. It follows that Sabena has not proved that it has a *right* to a stay of execution, not even a *prima facie* right open to some doubt.'

[18] The stay of the writ by the magistrate, where the underlying causa was misconceived, was incorrect. Put otherwise, the basis for bringing an application to stay the writ did not exist. Insofar as the magistrate found differently, she erred. Her primary judgment is not subject to any appeal before this Court. As a consequence of the error by the magistrate, the appellant is left with a judgment that he is unable to satisfy through execution. This is exacerbated by the impending interdict which restricts him from taking any further execution steps against the respondent. This is untenable. It follows that the appeal must be upheld. The question of costs presents no difficulty and must follow the result. An order is therefore made:

Order:

[9] *Wiid v Fick* (1908) 18 CTR 680.

[10] *Van Rensburg v Bannister* 1916 EDL 384.

[11] 1980 (2) SA 238 (W) at 243B-C

1. The appeal is upheld with costs;

2. The order of the court a quo is set aside and in its place is substituted the following:

   ‘1. The application is dismissed with costs.

_____

Phatshoane DJP

Lever J concur in the Judgment and order of Phatshoane DJP

APPEARANCES:

For the appellant:	Adv D Smit Instructed by VDN Attorneys, Vryburg. Engelsman Magabane Inc, Kimberley.
For the respondent:	Adv AS Sieberhagen Instructed by Office of the State Attorney, Kimberley.